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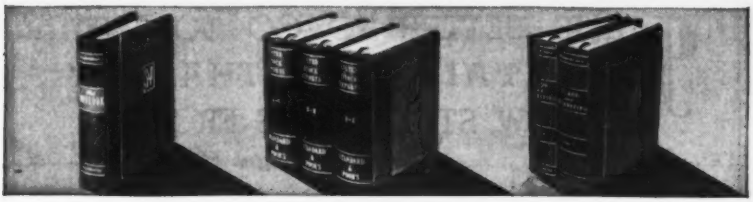

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BANKRUPTCY . . . STRAWS IN THE WIND!

By
PROF. SAMUEL C. DUBERSTEIN

Referee in Bankrupucy Eastern District of New York

Condensed from Commercial Law Journal, July, 1946

IN THE early days of the 19th Century, when our country was in the throes of its first depression, the Congress, then in its swaddling clothes, enacted a law of bankruptcy of limited scope which had for its purpose solely the marshalling and liquidation of a bankrupt's assets.

Following subsequent financial crises, Congress became interested in the individual—in the human being—in the dignity of man. It realized that pauperism, another form of slavery, was not the legitimate state of man. Thus, Congress, with broader vision, saw the necessity of bringing deliverance to the heavy-laden but honest bankrupt by granting him a discharge of his debts.

As we study the more recent legislation on this subject, it is evident that Congress, in a desire to meet changing social and economic conditions, passed laws not merely in the interest of the creditor, or of the debtor, but rather, in the national interest.

From a "liquidation" statute we have gradually progressed so that today the term "bankruptcy" embraces within its fold provision for the rehabilitation of the debt-stricken individual, partnership, corporation (with certain exceptions), farmer, railroad and municipality. Bankruptcy law is not rigid or fixed. Rest assured that Congress will rise to the occasion and will meet the test of ever-changing future conditions which may appear. In this period of reconversion from war to peace, it is reasonable to anticipate that our lawmakers will soon be deliberating on several important matters affecting the law of bankruptcy.

There was the instance of a bankrupt who filed his petition scheduling liabilities of about $10,000.00, while earning an annual salary of over $20,000.00 as head of a candy manufacturing corporation in which he owned no stock. None of the

grounds of objection to a bankrupt's discharge appearing, creditors are left without a remedy. Another argument in favor of the conditional discharge may be found in a matter where the bankrupt, shortly before filing his petition, sold his war bonds, and with the cash proceeds paid $100.00 to his lawyer for filing the bankruptcy petition, $300.00 for his wife's and his own dental plates and the balance of $100.00 to pay for a dinner party to celebrate his election to office in a local fraternal organization.

Then there is agitation respecting the proposed amendment of Section 17 of the Bankruptcy Act so that the granting of a discharge will include a release of the ever-increasing burden of tax claims. In personal commercial bankruptcy it has been found that tax claims constitute a very considerable proportion of the total obligations of a bankrupt. In view of the current divers tax laws and high tax rates, this tax indebtedness of bankrupts will undoubtedly increase in the future; and unless some relief is given the bankrupt, so as to afford the individual the opportunity to rehabilitate himself, freed from burdensome obligations, one of the great purposes of the bankruptcy law will be defeated.

Even administrative agencies are conforming to the conditions of the times. Since December 1, 1945, judicial sales pursuant to orders of the Bankruptcy Court are no longer subject to OPA price ceilings. However, this does not as yet apply to sales by a receiver or trustee in bankruptcy while conducting business.

Although as recently as June 3, 1946, the President approved the measure by which the time has been extended temporarily until March 31, 1947, for farmers seeking relief by way of compositions or extensions to file petitions under Section 75 of the Bankruptcy Act, Congressman Lemke has introduced a bill to make Section 75 a permanent part of the Bankruptcy Act.

A new law, the Referee's Salary Bill, continues the Courts of bankruptcy through the medium of Referees—on a salary basis—and puts an end to the unsound fee system.

Undoubtedly you must have observed that within the past fifteen years the office of Referee has been accorded greater recognition and importance by Congress. From a minor position of reporting to the District Judge for final decision his (the Referee's) views as to issues of fact and law, the Referee now has, among other things, jurisdiction to grant or deny discharges and to confirm or refuse to confirm arrangements. Perhaps the day is not far distant when bankruptcy and debtors' relief proceedings will be administered by United States "Debtor and Creditor" Courts, a more embracing

term than the stigmatized term "Bankruptcy" Court.

Our land is still in a whirl and in an uncertain state of confusion. Who can deny that these never-ending strikes—the interminable struggle between capital and labor—unless adjusted soon and equitably, will cause the post-war boom era bubble to burst?

It has been stated, on good authority, that during the war many business enterprises did not have their books audited by Federal, State and local taxing authorities, so that, when, in many instances, insolvency occurs it will be terrifying to contemplate the tremendous accumulation of tax assessments which in the administration of a bankruptcy estate the courts must recognize as entitled to a priority status.

During the past seven or eight years, Referee Kurtz and I have been sounding warnings regarding the problem of tax claims in bankruptcy. We realized that though our cause was a just one, Congress would do nothing until after the hostilities had ceased. Now, with the war over, merchant groups should be organized to tackle the tax claim problem which has made such inroads in the eventual small amount of dividends paid to general unsecured creditors. Call on the members of the fourth estate, the editors and reporters of the financial and business papers and periodicals. Urge them to help. Have your League and similar organizations appeal to Congress for enactment of appropriate laws to create an equitable statute of limitations affecting priority claimants; and the effective cutting off of interest on tax claims upon the institution of the bankruptcy proceeding.

A year after the "shooting" has ended, as we look at the post-war business horizon, we find that we are apparently in a "boom" period. This is a seller's market. There is demand for radios, electric appliances and other consumer-item products. We see millions of war workers and veterans who have been released from their former occupations and duties and are now to be found heading their own businesses. With their war bonds and "mustering out" pay, —and the new skills they acquired, they have become, as one writer refers to them, "the owners of large dreams and small capitals." An impressive number of new one-man corporations have been organized. Of course, all this does not mean success.

Roger Babson, the well-known economist who predicted the 1929 financial debacle, again looks into the business crystal ball and warns returning men of the armed forces not to go into business for themselves. But youth throws caution to the winds. Already one sees them with their small capital approach the local banker for loans. Can't you hear the bank vice-president

say: "We must have a financial statement," and, "What collateral have you?" and, "We must have your wife's endorsement." And you know how cold bankers can be. Don't turn to them for any encouragement or aid. And I'll tell you why. They look upon these former war workers and servicemen who embark upon their own business ventures—at least 75% of them—as doomed to inevitable failure. While the percentages may seem high, they're not far wrong. Can't you see what will happen to these men with limited capital when the easy-money period has passed and keen competition has set in? The chance for survival is slim.

Commercial failures or bankruptcies—like poor relations—will always be with us. Waving magic wands cannot eliminate these unfortunate conditions. Neither can Presidential decree or Congressional action eliminate them. Perhaps this is not the time to dwell at length on the respective merits of the prophylactic and therapeutic method to be applied in the treatment of "sick" businesses.

But here's a suggestion. (Sounds like the Professor addressing his students.) Let us improve our time rereading at our leisure—of which we are now probably enjoying a super-abundance—the Bankruptcy law and its outstanding beneficent and humanitarian features. Then be prepared to tell these young, venturesome spirits, bewildered and overwhelmed, when they come to you with their difficulties, that we have laws to rehabilitate the heavy-laden debtor, to reorganize the business structure, to relieve the debt burden. Acquaint them, according to the character of the business involved, with the purpose of Chapter X of the Bankruptcy Act for corporate reorganization of secured obligations; with Chapter XI for those seeking an arrangement with general unsecured creditors; with Chapter XII for real property arrangements by persons other than corporations; with Chapter XIII for the wage earner plan where the debtor may be harassed by gar-

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nishment. Tell those who seek your advice that the Bankruptcy Act makes possible adjustments and settlements; that they can avoid the stigma of the term "bankrupt;" that, with reasonable financing, a debtor can receive the approval of a "fair, equitable and feasible plan" which has had the benefit of the best opinion and "collective bargaining" in which the creditors, the debtor and the Court participate, whereby the business may be reorganized on a basis of an assured successful future.

You and we (the Referees) are humanitarians. We are men of good will who should "gird our loins" for the difficult days which lie immediately ahead. As life moves on in sun and shade, we should minister to the needs and welfare of those afflicted with business ills. Let us enlist in this noble work to which we have dedictated our lives—to give the debtor and the creditor the benefit of our best constructive thought—to assume the responsibility of real citizenship in this blessed Government of ours.

A Surveyor's Dilemma

Your letter of the 16th concerning the George Jones survey is at hand. The field work of this job is about two thirds complete, I hope.

It is very slow and uncertain going. Where any descriptions of the boundaries are extant, such descriptions are replete with errors, omissions and absurdities in general. As for evidences of occupancy, these are scanty and contradictory. In general this is a survey by induction, which is a good deal like psychic bidding in bridge, or to use a more apt parallel, like reconstructing the life of prehistoric man from a few broken pieces of pottery, some of which have been planted. It is a most interesting archeological study, but doubtless most annoying to Mr. Ernest Jones, who wishes to pass the title and receive the good and valuable considerations in the immediate future if not sooner.

Nevertheless by diligent work and a modicum of divine guidance I hope to have a fairly reliable and true map of the agglomerated, amputated, mutilated, abused and misrepresented lands of Mr. and Mrs. George Jones within the next few weeks and even to have reasons for my faith in its reliability. In the meantime I may only hope for your patience and sympathy.

Yours,

Contributor: Lloyd R. Le Fever, Kingston, N. Y.

The Most Remarkable Case in the Courts of America

By JOHN W. GREEN
Of the Knoxville Bar

Condensed from
Tennessee Law Review, April, 1947

THE story begins with the arrival in New Orleans in the year 1787 of Daniel Clark, a young Irishman about twenty-one years old, who had been educated at Eton in England and who came to New Orleans to join an uncle engaged in business there. Young Clark is described in the opinion of the Supreme Court as "a man of much personal pride and social ambition, of high intelligence, full of enterprise. Very peculiar in some respects, with numerous chivalric and honorable dispositions, and unquestioned pecuniary integrity."

Among his acquaintances were a Frenchman named DesGranges and his wife, Zuline, who had a confectionery shop on St. Anne Street. She was a Creole and is described as being very beautiful. Clark was attracted by her beauty and frequently visited the confectionery shop. About the year 1801 DesGranges left New Orleans for a visit to France and Clark, who by that time had become infatuated with his wife, formed an illicit connection with her and she gave birth to a daughter who was given the name of Caroline. Apparently Clark seemed to care nothing for this illegitimate child and paid very little attention to her. This affair, however, did not end his association with Zuline, and in the year 1805 he sent her to Philadelphia with a letter of introduction to his friend and partner, Daniel W. Coxe, a resident of that city, informing him that she was pregnant and requesting him to provide suitable lodgings for her and arrange for the necessary medical attention during her accouchement. Coxe complied with his request and in due time another daughter was born and was given the name of Myra. The mother and child returned to New Orleans. The attitude of Clark towards this daughter was entirely different from his attitude towards the other daughter. He showed the greatest affection for Myra, visited her often, and established her

and her mother in a beautiful home and provided them with every comfort and luxury that money could buy.

While Myra was still young, and before she became old enough to understand the situation, he sent her to the home of Colonel Davis, in the State of Delaware. Davis and his wife, who had formerly lived in New Orleans and were among Clark's closest friends, welcomed the child and made no distinction between her and their own children. On her part, Myra looked upon and loved Colonel Davis and his wife as her own parents. They called her their daughter and she never knew the difference until after she had grown to womanhood and became engaged to William W. Whitney, a very worthy young man whose home was in New York.

Colonel Davis did not approve of her engagement to Whitney and tried to break it. When he found he could not do so, he became angry with the girl and in a burst of temper told her that she was not his daughter but that Daniel Clark, then long since dead, was her father. Notwithstanding Davis' opposition, she married Whitney who from that time on until his death loyally supported his wife in her efforts to unravel the tangled skein of her life and regain her father's estate which she firmly and unalterably believed belonged to her.

It will be necessary at this point to go back to Clark in New Orleans. He had prospered beyond his wildest dreams and had amassed a huge fortune, which it is alleged he disposed of in two conflicting holographic wills. One of the wills, dated in 1811, in which he appointed his partners, Richard Relf and Beverly Chew, executors, and gave everything to his mother, was found among his papers when he died. The other, dated in 1813, in which it is claimed his daughter was named the chief beneficiary, was never found.

The will of 1813 is alleged to have been lost, stolen, or destroyed, and the lawsuit grows out of the effort of Clark's daughter to prove her legitimacy and supply and set up its contents by secondary evidence. Her first step was to go with Mr. Whitney, her husband, to Cuba to see Colonel Bellechasse, a former resident of New Orleans and Clark's staunchest and most intimate friend, to find out what he knew about the will. Bellechasse welcomed them to his home and informed them that Clark had left money with him to pay for Myra's education and that he had repeatedly told him she was his legitimate daughter and that he intended to give her all his property.

Armed with this information Myra and her husband proceeded at once to New Orleans (this was in 1835) and filed a petition to probate a copy of the will which they alleged Clark had

executed a short time before his death in 1813, by which he gave his estate to Myra.

The filing of this petition created an immense sensation in New Orleans. Hundreds of people had bought property belonging to the Clark estate from Relf and Chew, executors under the will of 1811, and they realized that if Myra was successful in her efforts to establish the will of 1813 they not only stood to lose their homes, but would also be liable for back rents and interest from the time they took possession of the properties.

Louisiana, which before Thomas Jefferson bought it and made it a part of the United States, belonged at different times to Spain and to France, had adopted the Roman Code, or what is generally known as the Civil Law. Under this system of jurisprudence an illegitimate child could not, either by will or inheritance, succeed to the ownership of the father's property.

The death of Whitney left Myra with no money and few friends. She had to fight her battles alone in a hostile city before hostile courts. About two years later she married General Edmond Pendleton Gaines of the United States Army. Born in Virginia, General Gaines was a soldier of distinction, a courtly gentleman, and an affectionate

"Its for 'Fingers' Boski's welcome home party. He was acquitted!"

"When the Need Arises"

When the need arises someone fills it. This seems to be almost a law of our present civilization.

When the old stage coach became too slow, the steam engine appeared. The horse and buggy days gave way to the automobile. The electric light came along when the oil lamp became too cumbersome for lighting our cities.

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husband. He at once took an interest in his wife's affairs and supported her contest with his money, advice, and influence as long as he lived.

The first question to be settled was whether Daniel Clark and Zuline DesGranges had been lawfully married. The only direct proof that they were is the testimony of Madame Despau, the sister of Zuline. She swears that they were secretly married in Philadelphia in 1802, that she was present at the wedding and saw them united in the holy bonds of matrimony by a Catholic priest and a Mr. Dosier and "another gentleman" whose name is not disclosed were also present. Her testimony is shaken by the fact that the priest did not testify, Zuline did not testify, neither did Dosier or the "other gentleman," and by the further fact that the records of the Church fail to disclose any such marriage. The proof shows that she married a man named Gardette in Philadelphia in 1808 and went with him to France where she remained until 1835 and that she returned to New Orleans about the time Myra began her suit. Why was she not called as a witness?

Clark's conduct after the alleged marriage is wholly irreconcilable with the contention that he had married Zuline. In 1808, while sojourning in Washington, he fell in love with a Baltimore lady, Louisa Caton, the attractive and wealthy granddaughter of Charles Carroll of Carrollton, one of the signers of the Declaration of Independence, and offered her his hand in marriage, was accepted, and arrangements were being made for the wedding when her family broke it off on account of reports they had heard affecting Clark's financial condition.

The next question to be settled was the establishment of the will Myra claimed her father had executed in her favor in 1813. Mrs. Smythe was the only witness who claimed to have actually read the will. If so, where was the will and what became of it? It is contended that Relf and Chew destroyed it, but they deny it and it is not shown that they did destroy it. It was not found among Clark's papers when he died. Where did he keep the will? If he was anxious that his daughter should have his estate, why did he not see that the will was deposited in trusted hands beyond all hazards of loss and destruction? Why did he preserve the will of 1811 in which he gave everything to his mother?

The State Courts of Louisiana gave Myra scant consideration, and time and again almost contemptuously threw out her case. Her lawyers in consequence of this action, instituted suit in the United States District Court and sought to have that Court apply the principles of equity to the determination of her rights, but the Federal Judge flatly announced that he would be con-

trolled alone by the Civil Law and by the statutes of Louisiana, and decided the case against Mrs. Gaines. She appealed, and in 1844 the Supreme Court of the United States, in *Gaines v. Chew*,[1] reversed him and ruled that while the Court of Probate of Louisiana had exclusive jurisdiction of the proof of wills, where a will is attacked on the ground of fraud and an attempt is made to set up what is alleged to be the true will, the Federal Court has jurisdiction to grant equitable relief independent of the Civil Law. In 1848, in the case of *Patterson v. Gaines*,[2] the Supreme Court adjudged that Daniel Clark and Zuline Des-Granges had been lawfully married.

This ruling was confirmed in 1860 in the case of *Gaines v. Hennen*.[3] Again in 1867 a majority of the Court, in *Gaines v. New Orleans*,[4] reviewed all the facts and reaffirmed the decision.

Soon afterwards a new suit by a new party raising a new question was instituted in the State Court to set aside the probate of the will of 1813. If this contention prevailed it would have the effect to nullify all the judgments theretofore rendered in Myra's favor. Both the Parish Court of New Orleans and the State Supreme Court sustained the suit and did nullify it. Myra took the case by writ of error to the Supreme Court of the United States in 1875 and that Court in *Gaines v. Fuentes*[5] reversed the judgment. This decision did seem to finally and conclusively establish all the questions in Myra's favor.

The law's delays are proverbial and Mrs. Gaines' experience in the courts affords abundant proof of the truth of the proverb. She soon discovered that it is one thing to win a law suit and quite another thing to reap the fruits of the victory. By virtue of the judgments establishing her rights she was potentially one of the richest women in America, but old age overtook her and found her struggling to convert her success into tangible results. She compromised with some of the people who had innocently bought the property, but she pressed her claim against the City of New Orleans—not only for the rents it owed her, but for the value of property the City had acquired from the Clark estate for a pumping station. The amount of the City's liability for back rents and revenues was enormous and was not adjudicated until after Mrs. Gaines' death.

[1] 2 How. 619, 11 L. Ed. 402.
[2] 6 How. 550, 12 L. Ed. 553.
[3] 24 How. (65 U.S.) 553, 16 L. Ed. 770.
[4] 6 Wall. (73 U.S.) 642, 697, 18 L. Ed. 950.
[5] 92 U.S. 10, 23 L. Ed. 524.

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Estate Planning

by

JULIAN D. WEISS*

Condensed from
Los Angeles Bar Bulletin, January, 1947

FROM the attorney's point of view, estate planning rests on the premise that action advantageous to the client benefits his legal counsel. A chat with the principal stockholders or partners of a business relative to their personal affairs can afford you, as attorney, an opportunity to render an important service. It shows the client you are anticipating his personal problems and are conversant with present tax developments and general economic complexities which make such an estate analysis vital to individuals of means. Aside from immediate fees to be derived from planning and drafting trust agreements and wills, where you are in touch with the private affairs of the principal and acquainted with the family, their desires and needs, the probability is greater that you will be retained in the settlement of the client's estate. Also, in some cases, action to be taken involves public financing or other steps relative to major assets of the client. This also means additional legal business.

Proper estate planning must be a tailor-made job, geared to the needs and objectives of the individual. It is affected by the size of the estate and the individual's family situation. It is exclusively the job of the attorney to decide what legal vehicles best can effectuate his client's objectives. The next problem, which is that of best expediting those objectives in actual practice, very often is an administrative problem which best can be solved by the combined efforts of legal and financial counsel. In some cases the best medium is to establish inter vivos trusts for the benefit of certain members of the family while in others it is a well-drawn will creating a testamentary trust. Either of these alternatives involves a host of problems, including such financial matters as obtaining proper diversification of assets,

* Member Illinois Bar. Registered Investment Counselor with S.E.C. and State of California. President, First Investment Corporation, Los Angeles.

timing of possible public sale of a portion of the client's business, and so forth. Some of the benefits to the client are summarized below:

1. *Financial advantages with respect to income and estate taxes.*—For example, a living trust established for the benefit of one's children (so drawn, of course, as to indicate clearly that it is not a support and maintenance trust) can effect substantial income tax savings for an individual in high brackets. Or, if an individual establishes a testamentary trust and gives the wife only a life interest, as contrasted with an outright bequest of his property, a second set of succession taxes is avoided upon her death, thus maximizing the net estate accruing to the settlor's children.

In terms of Federal estate taxes alone, disregarding savings in state inheritance taxes, the picture would appear as follows:

Size of Net Estate	Tax on Outright Transfer	Tax on Testamentary Trust	Approximate Saving
$ 200,000	$ 55,590	$ 32,700	$ 22,890
500,000	212,520	126,500	86,020
1,000,000	496,195	302,300	193,895

That this question of taxes is of long term rather than temporary importance is best seen by noting the tremendous government debt and the current and projected Federal budgets. These concretely illustrate that the present era of high taxes will be with us for a long time.

2. *Greater safety resulting from diversification.*—You can be certain that people of means are giving this subject serious consideration. Thus "The Exchange" (the official publication of the New York Stock Exchange) states in the June, 1946, issue: ". . . one may be led to inquire into the train of economic events which has forced partial liquidation of many former large holdings. Inheritance levies, income tax rates which hinder the accumulation of capital and considerations of diversity are among the well-known factors which in recent years have produced a stream of 'secondary' and 'special' offerings."

Numerous small businesses have grown to large stature during the war years. Many individuals have "all their eggs in one basket." There are obvious advantages in diversifying and protecting one's asset position by selling a portion of closed corporation holdings.

3. *Liquidity and Valuation.*—Where interests are concentrated in one or two closely held enterprises, the owners contemplate with concern what may happen to their estates after they pass out of the picture. Aside from the lack of liquidity, there is always the possibility that the Treasury Department may assess a high finding of value on these assets to the detriment of the estate. Helpful suggestions by the attorney include:

(a) The role of life insurance as a convenient means of avoiding needless sacrifice of valuable holdings for which there may be no purchaser available on death.

(b) Use of the stock liquidation trust.

(c) Public sale of a portion of the holdings.

(d) Establishing a record with respect to value. One method is to make certain gifts at which time the subject of value is considered by the Treasury Department. In many cases, since the amount involved is much smaller than would be the evaluation on death (when the worth of the entire holding comes into question) there is a possibility of establishing a relatively more favorable value. It is recognized that owing to the time element and changes in economic conditions, value at date of death may differ radically from that obtaining at the time of the gift. But in any event, this first step will have established some index as to the Treasury Department's thinking in the particular case.

4. *Attainment of Objectives for Family.*—Equally important to the client is the knowledge that his long term objectives relative to the financial safety of his wife and children can be obtained via the use of a trust. The actual effectuation of these objectives can best be carried out by qualified institutions and individuals experienced in the complexities of trust investment administration. It is a well-established fact that the average widow who receives a large sum of money, subject only to her own supervision, usually dissipates the fund in a remarkably short period. This occurs either as a result of her own inexperienced judgment or unsound counsel, from those who have an axe to grind, or the importunings of less fortunate relatives who invariably seem to need a "few extra dollars."

Feline Psychology

A conscientious saleswoman in a downtown department store was on the witness stand. The Prosecuting Attorney asked her if the woman sitting in the courtroom was the one who had written a worthless check.

"The woman who wrote the check was dressed differently and wore her hair differently," the saleswoman said cautiously. Then, to the dismay of the defense attorney, the accused spoke up. "That's not true, I wore my hair the same way that day."

That was enough for the jury.

St. Louis Globe-Democrat

The Relation of Lawyers to Economists

By ROBERT M. SEGAL

Boston Attorney and Fellow, Brookings Institute

CONDENSED FROM BOSTON BAR BULLETIN, FEBRUARY, 1947

IT WAS in 1897 that Justice Holmes predicted that for the rational study of the law the man of the future would be the man of statistics and the master of economics rather than the black-letter man. This relationship between law and economics has long been recognized by students in both fields, but this subject recently has attracted new attention.

The practicing lawyer, however, recently has become very cognizant of Justice Holmes' prediction and of the importance of economics and the economist in many new and specialized fields which warrant some discussion.

The lawyer meets the economist face to face first in the anti-trust field. The very foundations of the anti-trust acts are founded on economic problems and considerations. The Sherman Act reflected a *laissez faire* philosophy, while the Clayton Act dealt with such economic problems as price discrimination, tying contracts, intercorporate stockholdings and interlocking directorates. In the courts, the reasons assigned for holding monopolies unlawful were economic in nature and even under the rule of reason laid down in interpreting the Sherman Anti-Trust Act, the factors involved in a reasonable restraint of trade are economic.

It is in this anti-trust field that the economists have been sharply critical of the lawyer. Professor Watkins writing on anti-trust policy in the American Economic Review says,

> "Without benefit of economic training, unskilled in economic analysis, and disdaining economic advice, the courts have developed, particularly in applying the rule of reason to mergers, a tolerance of oligopoly which is incompatible with the preservation of forthright competition in the market."

Thus, there is need for more cooperation in this important field between the lawyer and the economist. As Professor Edwards has pointed out,

> "The case-by-case method and the so-called 'rule of reason' permit the courts to take some account of economic fact and analysis under the varying circumstances of a far-flung industrial system."

In anti-trust suits, which seem to be increasing, the lawyer is faced with such economic con-

cepts as competition, monopoly, monopolistic competition, marginal and overhead costs, quality, size, efficiency, Pittsburgh plus, basing points, duopoly, oligopoly, price leadership and inelastic demand. Although the lawyer is versed in rules of pleading, evidence and legal concepts, it is the economist who is familiar with price theory, economic data, the organization of the industry and the peculiar economic circumstances of the problem. In the preparation of the case, the lawyer should rely on the economist to prepare, collect, analyze and synthesize the relevant data and to be the expert witness.

ROBERT M. SEGAL

A second broad field where the economist encounters the lawyer is in labor relations. With the changes in labor law in the last twenty years as a result of such legislation as the Railroad Labor Act, Norris-LaGuardia Act, National Labor Relations Act, Fair Labor Standards Act and Social Security Act, collective action by unions has become increasingly important in the labor field. Recent strikes have directed attention to the strength of labor organizations, the need for mediators and conciliators trained in economic matters and the important role of labor, rather than legal, specialists.

In general, the trend in this field has been to rely more on economists rather than on lawyers. Government agencies have been staffed with men trained in economics and statistics. For many years, the chairman of the N.L.R.B. was Dr. Harry A. Millis, former head of the Department of Economics at the University of Chicago. The President's fact-finding boards as well as impartial arbitrators for many industries included economists. Recently there has been a growth of professional economic mediators and conciliators in labor relations work. In labor disputes, the U.S. Conciliation Service has been relying on labor negotiators who are economists rather than lawyers. In industry, too, industrial relations sections are staffed with economists.

In dealing with various governmental administrative labor agencies, lawyers are confronted by economists. Investigations by the Wage and Hour Division are made by economists. Under the Fair Labor Standards Act, the definition of the words, "engaged in commerce or in the production of goods for commerce" has depended upon economic percentages and relationships. Under the Wagner Act, preliminary investigations are made by economists, and trial examiners are often not lawyers. Economic data are important in

questions relating to interference, discrimination, domination and support of company unions, appropriate bargaining units, supervisory employees and collective bargaining. In the work of the National War Labor Board, lawyers were overshadowed, for the courts refused to review the directive or advisory orders of this agency even though there was great moral compulsion on both parties and the President could seize the plant in cases where the company refused to accept the Board's decision.

In actual collective bargaining, more reliance is now placed on the economist rather than upon the lawyer. The union organizer or business agent is usually not a lawyer; the data presented by the union on cost of living, ability to pay, wage rates, piece rates, working conditions, check-off, union membership, seniority, work load, closed shop and union practices are matters for the labor expert or economist in the first instance. It may well be that some labor conflicts can be avoided by intelligent, well-versed management rather than insistence upon "legalistic" phrases.

Although lawyers are conversant with judicial decisions, legislation and the final writing of collective bargaining agreements, it is the economist or labor expert who should deal with the economic issues of the dispute. Many of the present problems of "portal to portal" suits might well have been eliminated by economic rather than legalistic considerations. The labor specialist should prepare and present the statistics and other data on employment, wages, productivity, costs and industry trends in collective bargaining with the union representative. The economist is the expert witness on labor relations and articles by economists in technical journals are increasingly relied upon by lawyers in their court cases. Lawyers must recognize this new trend or else be overshadowed in this field.

Similar observations to those above are applicable in several other fields. In tax law, which is

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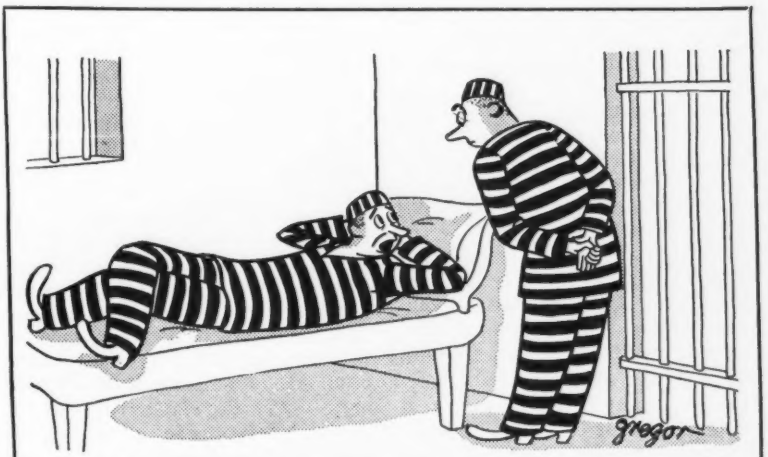
recognized as public law, economic problems of what is income and intangible wealth are more important than legal distinctions originating in a feudal land economy. Economists as well as accountants are often more important than lawyers in such problems as definitions of income, timing or income, corporate distributions and reorganizations, depreciation and amortization, excessive accumulations, bases for tax and "economic control."

In the general field of administrative law, the role of the economist is also expanding relatively to that of the lawyer.

These comments merely suggest some of the principal fields of increasing interdependence of law and economics. Not only must judges and lawyers be versed in economics but they should rely on economists. The latter can serve as expert witnesses, and in the administrative fields they qualify as the men who best can decide economic problems. More and more lawyers must come to recognize the value of assistance possible from the economist and economic data. Failure to do so on the part of the legal profession may mean the creation of industrial and labor codes and courts and may result in the abdication by lawyers of leadership in many vital fields.



". . . and then, I studied law,—but not enough!"

The Prospect Pleases

By Hon. JOHN W. DELEHANT
Judge of the United States District Court for the State of Nebraska

Condensed from The Journal of the Bar Association of the State of Kansas, May, 1946

EDITOR'S NOTE—This is an address which was delivered at the Annual Banquet of the Topeka Bar Association in Topeka, Kansas, February 16, 1946.

I AM, and by conviction must be, an optimist in respect of the probable future of the legal profession in the United States. For that matter, though most of its possible developments are quite inscrutable to me, I am forced by the logic of human history and literature in combination, to view with cheerfulness — mildly nervous, perhaps, but cheerfulness nevertheless — the future, from the viewpoint of 1946, of human society in general. And I reach that conclusion upon the demonstrable premise that the predicted degrading or annihilating tragedies to humanity on a universal pattern simply do not happen. The point I want to urge is that the morrow for the American lawyer is not as melancholy as we are sometimes tempted to apprehend. And I am regarding his rewards both in their material and in their spiritual aspects. I trust that I shall not be accounted "of the earth earthy," if I put first things first and give my earlier attention to the material side of his return for service rendered. For while he "does not live by bread alone," he nevertheless requires bread that he may earn also his more precious compensation.

My original resolution to study and practice law was altogether irrational. During the progress of the Spanish War I was seven years of age. And since my mother was an emancipated schoolmistress and our modern feather-bedding pedagogical methods were then unknown, I was already an omnivorous reader. One of my principal tasks—and highest privileges—was regularly to read in complete detail to a civil war veteran farm neighbor, who was himself unable to read, the week by week account of the develop-

ments and troop and navy movements in that war, as they were reported in The Weekly Kansas City Star. He was flatteringly appreciative of that service, and, in the course of it and, as I suppose to gratify my vanity, frequently told me that I should be a lawyer. Presuming from the assurance with which he spoke that he knew everything, I agreed with him. And from that point forward, through the rest of my rural school and high school and college studies, and until I was hopelessly enrolled in the law school, I was in controversy over the subject with my well loved father who entertained a rather low opinion of the moral attributes of the disciples of Kent and Blackstone, and was resolved to avert their blight from his own household.

So, from every available source, I was informed of the dubious ideals and precarious lot of lawyers. Their devious methods and questioned status in ancient generations were impressed upon me. The frequent suppression of the vocation in the course of the history of various nations was recalled. Epithets were repeated that our language has moulded for the characterization of the derelicts of our calling. And, of course, the notorious overproduction of lawyers was an almost daily argument.

But, quite through obstinacy, as I now think, and perhaps under a delusion of foreordination and predestination, I persisted in my resolution, though if the truth must now be told I was occasionally assailed by doubts which I diligently concealed. The final test of my faith, however, was reserved for the very eve of my admission to the bar.

In the Spring of 1913, the legislature of Nebraska, where the law of inertia seemingly required me to practice, enacted the then "pernicious and insidious" Workmen's Compensation Law. Whereupon, the elders in the profession I was approaching forecast the absolute end of opportunity within its ranks, and promptly set about the enterprise of circulating petitions for the submission of the detested measure to the people at a referendum election. If my appointment, or election, to public office were presently dependent upon a completely sinless life, I might be reluctant to admit that one of my earliest tasks in the only professional association I ever had, was the circulation under the direction of the partners in the firm of some of those referendum petitions.

To pursue that bit of history no further, it will be enough to record that the threatened desiccation of professional incomes never occurred.

I have mentioned this incident because it is fairly characteristic of one complaint we hear in 1946. It is said the Boards and Bureaus have usurped the law business, that the courts have been despoiled of their jurisdic-

tion, and that there is no longer room for the lawyer in the presentation of litigable controversies.

But I venture to assert on many grounds, that in its overall effect, this trend is not necessarily or pragmatically destructive of incomes from the practice of law. That it has an adverse impact upon a good many individual practitioners I can well suppose. Nor am I able to project before you an accountant's graph demonstrating the hopeful statement I have just made. But some considerations in support of it may be offered.

My personal experience as a member of an established firm in a county seat town of ten thousand population was entirely favorable to the view I suggest. The firm's income was patently and substantially increased, rather than diminished, insofar as it was derived from issues of the sort I have mentioned. And it should be so considered, I repeat, in a comprehensive view.

There is an inclination among pessimists and dissident politicians, grossly to exaggerate, if not in fact to misrepresent, the extent to which actually existing rights justiciable in formal courts have been withdrawn from the arbitrament of such forums and entrusted to nonjudicial boards. What has generally transpired is rather the

"All right, now I'll talk!"

The Story Back of this Headline

IN THIS ISSUE THE LEWIS CONTEMPT CASE

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creation of new, or the statutory definition of pre-existing, though possibly dormant, rights, which, on their creation or definition, might have been determinable in the courts but for their concurrent commitment to the jurisdiction of an existing or wholly novel statutory administrative board.

But it is said, with no little accuracy, that lawyers are suffering financially from two not wholly unrelated developments. The first of these includes the fairly prevalent devices to avoid the ordinary financial burdens incident to legal procedure upon death. And the second is the actual practice of law by unauthorized agencies. There is virtue in both aspects of this point; and they have a peculiarly adverse incidence upon the country lawyer. I am disposed to think that the partial solution of both of them lies in the field of the profession's education of its clients. The bar has been traditionally inept in its attention to public relations. And it may well reconsider its attitude in reference to these two questions. Repressive legislation alone will not solve the second difficulty; and rational legislation will be obtainable only in consequence of purposeful education. And even here, the net result is not identical with the gross loss of revenue. There are, unfortunately, compensatory considerations. A lawyer friend of mine once cynically but truthfully remarked, towards the end of a long and successful career, that his fee in a single action necessitated by the incongruities of a will prepared by a layman, far exceeded all those he had gotten through more than fifty years for preparing wills.

For the moment, it is said that there is a readily apparent recession in the number of litigated cases. I am persuaded that that statement is not strictly true in the country's federal courts. It is undoubtedly true in respect of our private civil actions, notably those where our jurisdiction rests upon diversity of citizenship. And, of course, that diminution in volume is proportionately reflected in the number of civil actions in the state courts. In part, that trend reflects an enlightened evolution in practice within the profession itself during the last sixty years. Our pioneer professional forebears were of a combative generation. They zestfully litigated controversies, both great and small, to the bitter end, but not always wisely, whether their own or their clients' interests be chiefly regarded. Too frequently, one may suspect, they settled the law at the expense of clients who had little real interest in its development; and, in consequence, got their own fees in the currency either of personal gratification or resentment over judicial perversity. I am persuaded that their descendants in the calling pursue the more prudent

course in resorting to composition, where it is available, and this from the viewpoint both of their own interest and of their clients' ultimate welfare. For the rest, though with due acknowledgment of the peril of generalization, the paucity of civil cases may be attributed in substantial degree to the war and its observable contraction of the sources of litigation. Any manufacturer will experience an almost annihilating reduction in his controversial problems, if his customers are suddenly reduced in number from five thousand private concerns to a single one, and that his government. And, to the extent of that influence, we may anticipate normality in litigation, if and when stability returns for industry and business generally.

Some of you, indeed, may think of the recent recession in the number of criminal prosecutions that have passed through our courts. I wish I might confidently assert that that development was permanent, for its persistence would be a boon to us all. But the stark and tragic truth is that the pendulum is already on its reverse course, to what extremity I shall allow you to speculate.

The United States is incomparably a nobler and a more stable nation in consequence of the public service of its lawyers. They have known the history and the warning signs of tyranny on the one part, and on the other hand of disorganization and anarchy. They have appraised the force and direction of social and governmental trends. At their insistence, a watch has been constitutionally set upon the oppression, alike of one man or of a privileged few, and of a transient majority, however large.

Their more impatient fellow citizens have frequently resented their acknowledged conservatism and reluctance to subject the American commonwealth to mere reckless experimentation. Perhaps, on occasion, they have impeded change that might have proved to be real progress. It could hardly be otherwise. But, certainly, they have frequently averted from our nation the destructive blight of "change upon the mere hypothesis of change," so eloquently chastised by its first president. On the whole, their contribution to the United States we know and cherish, has ministered to rational liberty untarnished by license; to respect and reverence for order and the law; to constitutional stability without the corroding consequence of legal stasis; to balanced and reasoned progress, as the evolution of science, industry, society and government has disclosed its need; in fine to the progressive improvement and exaltation of American life and living.

It is said that they have needlessly crowded our legislative halls, our executive chambers, and our administrative offices.

Well, the talent for public service which their professional training and experience have begotten has both prompted them to accept public labor in wide variety, and led their neighbors confidently to select them for such work. With no time for the fortification of the thesis, I shall simply assert that the service has been fruitful and that the continued demand for it is its sufficient commendation.

And the demand for lawyer-like thought and action in the national interest was never more urgent than in the present hour. It is never so imperative as in seasons of national stress or of rapid and violent change. And when, in these hundred and sixty years of its life, has this nation encountered stress, domestic or foreign, comparable with that which now confronts it, or the equally imperative certainty of wholly uncertain change?

There will be work for tomorrow's American lawyer, unremitting and constant work, and remuneration, both financial and spiritual, commensurate with his labors.

I close with this proof of my hope in the lawyer's future. The elder of my sons proposes to enter the profession. The choice is his alone. But I shall encourage him in his resolution — and in utter sincerity. More than that, I shall follow him with an affectionate paternal envy. I shall envy him that span of thirty-four years that separated our births, and in effect now stretches out before him. For in prospect, his life is intriguingly interesting and full. His America will have its frontiers and its pioneers, though they be of the spirit. His profession will be a courageous and progressive one. For it will still be the profession of Coke, of Sir Thomas More, of Blackstone, of Marshall, of Webster, of Patrick Henry and Reverdy Johnson, of David Dudley Field, of White, of Hughes, and of Cardozo. Those lawyers and jurists encountered mighty problems and solved them; confronted changing times and directed them; envisioned judicial reforms and achieved them; met with disturbing doubts and resolved them. And so it will be with that son's generation of lawyers, and with the inscrutable and too hurried residue of yours and mine. The prospect pleases!

The Guilty Party

If a man's garden is rooted up and destroyed, he has the right to take some sow by the ear, and the proper sow to catch is the sow that has done the rooting. Barger v. Hickory, 130 NC 550, 41 SE Rep 708, per Douglas, J.

Among the New Decisions

Actions—*proceedings on claim in another state.* In Morris v. Jones, — US —, 91 L ed (Adv 399), 168 ALR 656, 67 S Ct 451, opinion by Mr. Justice Douglas, it was held that a judgment obtained in the courts of another state not shown to be without jurisdiction over the parties and subject matter, against a foreign unincorporated association after the appointment of a statutory liquidator for the association in its home state and the issuance of an order in the proceeding staying suits against it, must nevertheless, under the full faith and credit clause, be accepted in the liquidation proceeding as conclusive of the existence and amount of the claim upon which it was based.

The annotation in 168 ALR 671 discusses "Right of receiver or other liquidator, or court appointing him, to contest or pass upon the merits or amount of claim, as concluded by pendency in another forum of action on claim or judgment thereon."

Amount in Controversy — *amendment in appellate court.* In Stacy v. Mullins, — Va —, 168 ALR 636, 40 SE2d 265, opinion by Judge Buchanan, it was held that the circuit court, on appeal from a decision of a trial justice pursuant to statutes governing appeals from trial justices to the circuit courts, which provide for a trial de novo in the circuit court on the evidence produced by either party, whether produced before the trial justice from which the appeal was taken or not, and direct that the case be determined according to principles of law and equity, may not permit the plaintiff to amend his complaint to claim an amount in excess of the jurisdiction of the trial justice.

The annotation in 168 ALR 641 discusses "Amendment in appellate court increasing amount claimed beyond, or reducing amount claimed to, jurisdiction of court below."

Automobiles — *entrusting to incompetent driver.* In William-

son v. Eclipse Motor Lines, 145 Ohio St 467, 168 ALR 1356, 62 NE2d 339, opinion by Judge Matthias, it was held that liability on the part of the owner of an automobile may arise where the owner entrusts his vehicle, with permission to operate the same, to a person so lacking in competency and skill as to convert the vehicle into a dangerous instrumentality, and who does in fact cause injury by his negligent operation.

The annotation in 168 ALR 1364 discusses "Common-law liability based on entrusting automobile to incompetent, reckless, or unlicensed driver."

Bank Deposits — *creation of trust in.* In Warner v. Burlington Federal Savings and Loan Asso., — Vt —, 168 ALR 1265, 49 A2d 93, opinion by Judge Sherburne, it was held that the fact that after the death of a depositor there was found attached by wire staples to the margin of the ledger card for a bank account a small card, signed by the depositor, stating that she wished to leave the money in the bank, both principal and interest, in trust for the bishop of a named diocese, does not establish a valid trust in the bank account, where the account was opened by the alleged settlor in her own name, the signature card was signed with her individual name only, and the same name appeared on the bank's ledger card, a passbook, which was found in the room occupied by her at the time of her death, was issued in her name, no notice was ever given to the trust claimant of an intent or desire that the latter should have an interest in the account, and the depositor made deposits in and withdrawals from the account at will without consent of or notice to the claimant.

The annotation in 168 ALR 1273 discusses "Creation of voluntary trust in bank deposit maintained in ordinary individual form."

Bank Deposits — *gift of.* In Cohen v. Newton Savings Bank, — Mass —, 168 ALR 1321, 67 NE2d 748, opinion by Judge Dolan, it was held that a valid trust is created in a bank deposit in the name of the depositor in trust for a person named, where he signed a depositor's card bearing the statement, "This account I hold in trust to control and dispose of as I see fit during my lifetime, but on my death to pay to the beneficiary the full amount then standing to the credit of this account" although no delivery of the bankbook was made to the beneficiary and she had no knowledge of the existence of the account until after the depositor's death.

The annotation in 168 ALR 1324 discusses "Gift or trust by deposit in bank in another's name or in depositor's own name in trust for another as affected

by lack of knowledge on part of such other person."

Bulk Sales Act — *businesses subject to.* In Mattechek v. Pugh, 153 Or 1, 168 ALR 725, 55 P2d 730, opinion by Judge Rossman, it was held that an apartment house owner is not engaged in the sale or manufacture of merchandise within the meaning of the provisions of Oregon Bulk Sales Statute (§§ 64–101, 64–104, Oregon Code) applicable to transfers of goods, wares, or merchandise or all or substantially all of the fixtures and equipment used in the sale, display, or manufacture of goods, wares, and merchandise.

The annotation in 168 ALR 735 discusses "Businesses or sellers subject to bulk sales statutes."

Burial Grounds — *exemption from taxation.* In State v. Ritschel, 220 Minn 578, 168 ALR 274, 20 NW2d 673, opinion by Judge Peterson, it was held that property must be in fact used for burial of the dead in order to come within constitutional and statutory provisions exempting public burying grounds from taxation.

The annotation in 168 ALR 283 discusses "Scope and application of exemption of cemeteries from taxation."

Conflict of Laws — *proof of negligence.* In Buhler v. Maddison, — Utah —, 168 ALR 177, 176 P2d 118, opinion by Chief Justice Larson, the Utah Supreme Court held that the statutory presumption of negligence and proximate cause arising under the provisions of a Workmen's Compensation Act, which, in defining the liability of a nonaccepting employer, declare that when an action is brought by an injured employee it shall be presumed that the injury was the result of and grew out of the negligence of the employer and that such negligence was the proximate cause of the injury and that in such case the burden of proof shall rest upon the employer to rebut the presumption of negligence, is a material and inseparable part or element of the right to damages prescribed by the statute; and when the employee brings his action against the nonaccepting employer in courts of another state, the lex loci, and not the lex fori, must govern the question whether the jury is to consider and weigh the presumption of negligence along with other evidence on the question of the defendant's negligence and proximate cause.

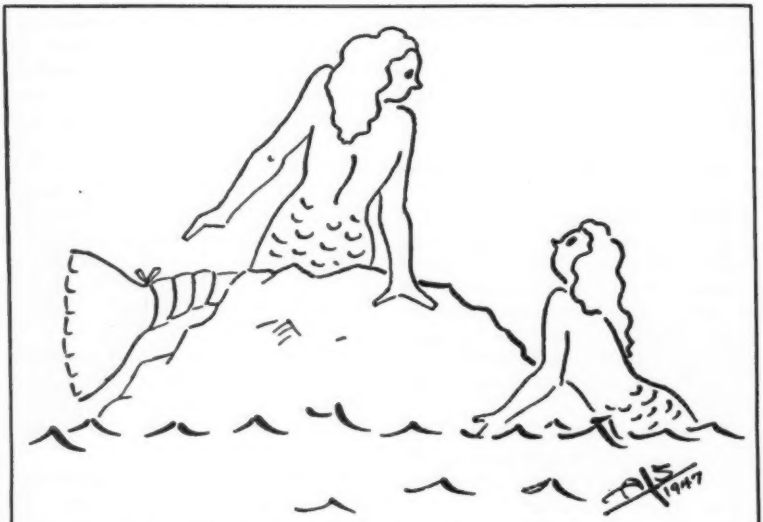
An annotation on the question "Governing law as regards presumption and burden of proof" appears in 168 ALR 191.

Criminal Law—*false promise.* In Chaplin v. United States, — App DC —, 168 ALR 828, 157 F2d 697, opinion by Associate Justice Clark, it was held that under a statute making it a

crime to obtain money by "any false pretense" with intent to defraud, the false pretense must relate to a present or past fact and not to mere intention not to perform a promise.

The annotation in 168 ALR 833 discusses "Crime of false pretenses as predicable upon present intention not to comply with promise or statement as to future act."

Divorce — *dower rights under foreign.* In Larsen v. Erickson, — Minn —, 168 ALR 788, 24 NW2d 711, opinion by Judge Julius J. Olson, it was held that an absolute decree of divorce obtained by a wife in divorce proceedings brought in a court of competent jurisdiction of another state having jurisdiction of both the marriage and the parties operates to bar the rights of the wife, who subsequently remarried, in property owned by her former husband during coverture where the inchoate rights given a wife in property of the husband do not, by the terms of the statute creating them, become vested unless the wife remains the "surviving spouse" of



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her husband, and the divorce statute declares that a decree of divorce granted in the state shall completely dissolve the marriage contract as to both parties.

The annotation in 168 ALR 793 discusses "Dower rights as affected by divorce in another state or country."

Divorce — *removal from state after service of process.* In Cukor v. Cukor, — Vt —, 168 ALR 227, 49 A2d 206, opinion by Chief Justice Moulton, it was held that the defendant in a divorce action who has removed from the state after being personally served with process is deprived of no constitutional right by being served by registered mail with a copy of an order made therein to show cause why judgment for arrears of alimony should not be entered against him.

The annotaton in 168 ALR 232 discusses "Jurisdiction to render judgment for arrearage of alimony without personal service upon defendant of whom court had jurisdiction in the original divorce suit."

Elections Officers — *change of return.* In State ex rel. Robinson v. Hutcheson, — Tenn —, 168 ALR 850, 171 SW2d 282, opinion by Judge Neil, it was held that the precinct judges of election, having completed their canvass and count of the votes cast in their precinct, certified their returns, and sealed the same as required by law, have no authority thereafter, in the absence of a statute to the contrary, to change or alter the returns by adding "sticker" ballots which they did not count, and the county board of election commissioners likewise are without authority to make such changes or to allow the judges and officers of election precincts to do so.

The annotation in 168 ALR 855 discusses "Power of election officers to withdraw or change their returns."

Entirety — *right to share in income from estate held by.* In Elko v. Elko, — Md —, 168 ALR 256, 49 A2d 441, opinion by Judge Collins, it was held that a wife's right to share equally with her husband in the income of property held by them as tenants by the entireties is not affected by the fact that she is unjustifiably living apart from him.

The annotation in 168 ALR 260 discusses "Rights in respect of estate in entireties or income therefrom as affected by separation of spouses."

Evidence — *when war ended.* An important decision, rendered by the Supreme Court of Washington, in Hoover v. Sandifur, — Wash2d —, 168 ALR 170, 171 P2d 1009, opinion by Judge Blake, held that extrinsic evidence is admissible to show what the parties intended by the terms

"duration" and "end of the war" in a provision in a written contract for the sale of a business reserving to seller an option to repurchase within six months "after the duration" or six months after the seller's subsequent discharge from the armed forces within three years "after the duration of the war," and that should the seller be discharged from the armed forces "prior to the end of the war" the option should not "be in effect during the duration except by written agreement of the parties."

The annotation in 168 ALR 173 discusses "Meaning of term 'duration' or 'end of war' employed in contract."

Gifts — *of United States Savings Bonds.* In Moore v. Marshall, 302 Ky 729, 168 ALR 241, 196 SW2d 369, opinion by Chief Justice Rees, it was held that United States savings bonds authorized by the Second Liberty Bond Act, which by the terms of the Treasury Department circular pursuant to which they were issued are not transferable, may not be transferred by gift inter vivos notwithstanding a statement in such circular excepting from their general exemption from taxation "gift taxes."

This very important question is discussed in the annotation in 168 ALR 245.

Insurance—*clause on military service.* In Coit v. Jefferson Standard Life Insurance Co., 28 Cal2d 13, 168 ALR 673, 168 P2d 163, opinion by Judge Schauer, it was held that a provision of a life insurance policy limiting the insurer's liability to the amount of premiums paid, with interest, if the death of the insured occurs "from any cause while the insured is serving outside the states of the United States, the District of Columbia, and Dominion of Canada, in the military, naval or air forces of any country at war (declared or undeclared) or within six months after the termination of such service if death be caused from any wounds, injuries or disease received or suffered while in such service," is not restricted to war and aviation risks by the fact that it is headed "Aviation and war risk exclusion rider," and such provision is therefore operative to limit the liability of the insurer in the case of a soldier whose death while serving in Alaska was due to an embolism following an appendectomy.

The annotation in 168 ALR 685 discusses "Validity, construction, and effect of provisions of life or accident policy in relation to military service."

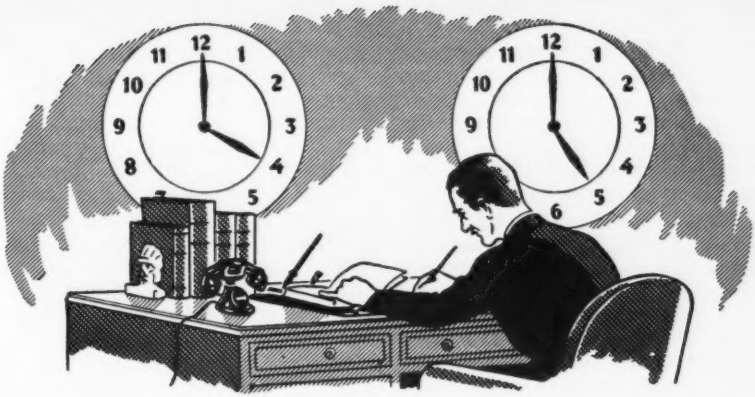
Insurance—*life insurance paid for with community funds.* In Volunteer State Life Insurance Co. v. Hardin, — Tex —, 168 ALR 337, 197 SW2d 105, opinion by Chief Justice Alexander, it was held that where there is

no intention on the part of a husband to defraud his wife the proceeds of a policy on the life of the husband vest in the beneficiary named in the policy upon the death of the insured even though the policy was taken out by the husband during the coverture and the premiums were paid out of community funds.

The annotation in 168 ALR 342 discusses "Application of community property system to problems arising in connection with life insurance policies."

Insurance — *printed matter outside policy.* In New York Life Insurance Co. v. Hiatt, 140 F2d 752, 168 ALR 551, opinion by Circuit Judge Healy, it was held that an unrestricted statement "double indemnity for fatal accident," stamped in purple ink on the cover page of an insurance policy in a manner calculated to challenge attention of the reader, is a part of the contract and controls the printed provisions of the double indemnity rider in the body of the policy, which, in providing for the payment of double indemnity for death resulting directly and independently of other causes from bodily injury affected solely through external, violent, and accidental means, excepts, among nine other exceptions, death resulting directly or indi-

"You raised me, Pop—you're an accessory!"



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rectly from the taking of poison or the inhaling of gas whether voluntarily or otherwise, rendering insurer liable for double indemnity for accidental death resulting from inhalation of carbon monoxide gas.

The annotation in 168 ALR 555 discusses "Effect of stamped or printed matter outside of body of insurance policy."

Judgment — *time of modification or vacation.* In Gelin v. Hollister, — Minn —, 168 ALR 195, 24 NW2d 496, opinion by Judge Matson, it was held that the service of a notice of motion to vacate findings, conclusions, and an interlocutory decree in partition proceedings, and the filing of the same and proof of service with the clerk of the court, before the expiration of the thirty-day period allowed for appeals, constitute an application to the court within such period, although the motion is not noticed for hearing or actually heard within such period.

The annotation in 168 ALR 204 discusses "Power of court to vacate or modify its judgment or order after expiration of prescribed period upon application made within that period."

Labor — *exhausting remedies within union.* In Leo v. Local Union No. 612 I. U. O. E. — Wash2d —, 168 ALR 1440, 174 P2d 523, opinion by Judge Jeffers, it was held that a member whose expulsion from a labor union on the purported ground that he solicited members to join another union was a nullity because the constitution and bylaws of the union did not make such solicitation a ground for expulsion and because the charges against the member were not made in writing and signed and filed as required by the laws of the union is not required to follow the procedure provided by the constitution and bylaws of the union for taking an appeal from the action of the union, but is entitled to pursue his remedy in a court by action to secure his reinstatement in the union and for damages resulting from his loss of employment.

The annotation in 168 ALR 1462 discusses "Exhaustion of remedies within labor union as condition of resort to civil courts by expelled or suspended member."

Life Estates—*dividends made possible by reduction of capital.* In Re Estate of Lloyd, 292 NY 280, 168 ALR 156, 54 NE2d 825, opinion by Desmond, J., it was held that dividends on stock of a corporation held in trust created by a testator a large part of whose estate consisted of such stock, which had been highly profitable, for the benefit of his widow, daughter, and grandson, were not out of earnings but out of a surplus resulting from a reduction of the corporation's capital, does not exclude them from the operation of a direction that

all dividends and stock rights shall be treated as income "regardless of the fact that such dividends and rights may possibly encroach upon the principal of the trust herein created."

A comment note "Construction and effect of express provisions regarding life beneficiary's right to dividends upon corporate stock" appears in 168 ALR 160.

Parties — *bringing in third party.* In Simon v. Strock, 209 SC 134, 168 ALR 596, 39 SE2d 209, opinion by Judge Oxner, it was held that one against whom a tort action has been brought is not entitled to have others brought in as defendants on the ground that they were the actual tort-feasors, where there is no allegation in the complaint showing any liability on their part.

The annotation in 168 ALR 600 discusses "Right of defendant to bring in third person asserted to be solely liable to plaintiff."

Perpetuities — *effect of invalidity of remainder.* In Love v. Love, 208 SC 363, 168 ALR 311, 38 SE2d 231, opinion by Judge Fishburne, it was held that successive life estates given to the children and grandchildren of the testator by a devise which gives land to the testator's two sons for their joint lives, and provides that upon the death of either the surviving son and the bodily heirs of the other shall hold the land during the life of the surviving son, that upon the survivor's death the children of either shall hold the premises for life, and that upon the death of any such children the interest of the child dying should go to the survivors, are not rendered invalid by reason of the fact that the ulterior contingent limitation providing that the property should revert to the testator's estate to be disposed of as property not specifically devised contravenes the rule against perpetuities, but take effect as though the will had not made mention of the remainder.

The annotation in 168 ALR 321 discusses "Prior estate as affected by remainder void for remoteness."

Political Parties — *regulating advertising by.* In Chronicle & Gazette Publishing Co. v. Attorney General, — NH —, 168 ALR 879, 48 A2d 478, opinion by Judge Kenison, it was held that a statute making it unlawful to pay or receive a higher rate for political newspaper advertising than for commercial advertising of a similar classification is not so lacking in a rational basis as to be arbitrary.

The annotation in 168 ALR 886 discusses "Constitutionality, construction, and application of statute respecting political advertising."

Schools — *furnishing transportation to pupils of sectarian*

schools. In Nichols v. Henry, 301 Ky 434, 168 ALR 1385, 191 SW2d 930, opinion by Judge Harris, it was held that a statute authorizing counties to provide, out of their general funds, transportation supplemental to existing school bus transportation, to pupils attending schools other than common schools in compliance with the compulsory school attendance laws, who do not reside within reasonable walking distance of the school attended, does not, in permitting the furnishing of transportation to pupils attending sectarian schools, encroach upon, or undertake to circumvent, the inhibitions of a constitutional provision that no preference shall ever be given by law to any religious sect, society, or denomination and that no person shall be compelled to contribute to the erection or maintenance of any place of worship or to the salary or support of any minister of religion.

The annotation in 168 ALR 1434 discusses "Constitutionality of statute providing school bus service for pupils of parochial or private schools."

Sentence and Punishment — *change of after commitment.* In People v. Fox, 312 Mich 577, 168 ALR 703, 20 NW2d 732, opinion by Judge Sharpe, it was held that a court is without inherent power to amend, in the interest of justice, a criminal sentence after part of it has been served, where the commutation of sentences is a constitutional prerogative of the governor and mitigation of punishment is within the jurisdiction of a parole board; and the existence of such power cannot be said to be recognized by a statute providing that in the event that any sentence imposed shall be changed in any respect by the sentencing judge it shall be the duty of the clerk of the court to give written notice of the change to the prosecuting attorney who shall be given an opportunity to oppose the change.

The annotation in 168 ALR 706 discusses "Power of trial court to change sentence after commitment or payment of fine."

Skating Rinks — *injury to patron.* In Brackins v. Olympia, Inc., 316 Mich 275, 168 ALR 890, 25 NW2d 197, opinion by Judge Carr, it was held that the proprietor of a roller skating rink, while not an insurer of the safety of those using the rink at his invitation, owes to them the duty of maintaining the floor of the rink in a reasonably safe condition for the purpose for which it is used.

The annotation in 168 ALR 896 discusses "Liability of owner or operator of skating rink for injury to patron."

Sound Recording — *as evidence.* In State v. Perkins, — Mo —, 168 ALR 920, 198 SW2d 704, opinion by Judge Leedy, it was held that phonographic re-

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cordings of a voluntary confession made by the defendant in a prosecution for rape are admissible in evidence against him when proper foundation is laid by the proof with respect to the use of this method of reproducing the voice of the accused.

The annotation in 168 ALR 927 discusses "Sound recordings as evidence."

Tax Sales — *effect on easements, etc.* In Hayes v. Gibbs, — Utah —, 168 ALR 513, 169 P2d 781, opinion by Chief Justice Larson, it was held that ordinarily, a tax sale does not divest easements charged upon the property sold.

The annotation in 168 ALR 529 discusses "Easement or servitude or restrictive covenant as affected by sale for taxes."

Torts — *privacy, invasion of, as.* In Cason v. Baskin, 155 Fla 198, 168 ALR 430, 20 So2d 243, opinion by Judge Brown, it was held that there is a right of privacy distinct in and of itself and not merely incidental to some other recognized right, for violation of which an action for damages will lie.

The annotation in 168 ALR 446 discusses "Right of privacy."

Trust Receipts — *Uniform Trust Receipts Act.* In Universal Credit Co. v. Citizens State Bank, — Ind —, 168 ALR 352, 64 NE2d 28, opinion by Judge O'Malley, it was held that under the Uniform Trust Receipts Act as adopted in Indiana, it is immaterial whether title is conveyed by the original seller of the goods to the dealer-trustee or to the entruster, so long as there is an underlying contract outlining the terms to govern the transaction, the giving of new value, and the giving of the instrument which conveys or transfers his security interest to the entruster, together with possession in the trustee for one of the purposes enumerated in the statute.

The annotation in 168 ALR 359 discusses "Trust receipts."

Trusts—*court's power to vary terms of sale.* In Henshaw v. Flenniken, — Tenn —, 168 ALR 1010, 191 SW2d 541, opinion by Judge Neil, it was held that while lands devised to a charitable or religious trust coupled with a total restraint upon the right of alienation are inalienable by the trustees, a court of chancery has the power to order a sale of the property where the sale will clearly sustain the general purpose and intent of the devisor rather than nullify or impair it.

The annotation in 168 ALR 1018 discusses "Power of court to authorize sale of property contrary to provisions of trust."

Warranties — *inspection of goods.* In Salzman v. Maldaver, 315 Mich 403, 168 ALR 381, 24 NW2d 161, opinion by Judge

Starr, it was held that statements in a written contract of sale of specifically designated sheet aluminum by one dealer to another that the buyer has examined the material preclude the assertion of an implied warranty of quality and fitness.

The annotation in 168 ALR 389 discusses "Implied warranty of quality, fitness, or condition as affected by buyer's inspection of, or opportunity to inspect, goods."

Warranties — *sale of seed.* In Henderson v. Berce, — Me —, 168 ALR 572, 50 A2d 45, opinion by Judge Tompkins, it was held that a statute which enables growers of potatoes to have their crops, when grown in accordance with regulations of the commissioner of agriculture, inspected by state inspectors and certified by them for seed, and which provides for the issuance of tags or certificates by the commissioner of agriculture indicating the variety of the seed which are to be attached to the containers or packages in which certified seed is offered for sale, and a penalty for the misuse of such tags or certificates, or the simulation thereof, but which provides no remedy for the buyer if the seed is not as represented, does not deprive a buyer of certified seed potatoes of his common-law right of action against the grower for damages for breach of warranty if the potatoes purchased are not of the variety certified, and a warranty, express or implied exists.

The annotation in 168 ALR 581 discusses "Warranties and conditions upon sale of seed, nursery stock, etc."

Zoning — *variations in ordinances.* The North Carolina Supreme Court, opinion by Barnhill, Jr., held in Lee v. Board of Adjustment, 226 NC 107, 168 ALR 1, 37 SE2d 128, that authority conferred upon the zoning board of adjustment to determine and vary the application of zoning regulations in harmony with their general purpose and intent when the strict letter of the regulations would work unnecessary hardship does not confer power upon the board to convert a residential section into a business district or to permit business establishments to invade residential sections and does not warrant action of the board in directing the building inspector to issue a permit for the erection, on a corner lot within a residential zone, of buildings suitable for, and to be used as, a grocery store and service station.

An extensive annotation in 168 ALR 13 discusses "Construction and application of provisions for variations in application of zoning regulations and special exceptions thereto."

★ From the Yale Reporter,
1946 Supplement

A Prof Takes a Gander[1] at the Students

by FRED RODELI
Professor of Law, Yale University

THE average professor (as likely a lug as an "average" freak) looks on students as a necessary nuisance. The trouble with students is they have to be taught; they have to be admitted occasionally to your office unless you're quick at locking the door or ducking under the desk; their illegible bluebooks have to be read (quiet, quiet!) and graded. All this takes time which the professor would far rather devote to other, more important, uses—such as signing his name to legal articles (usually researched and/or written by some pet and therefore a typical student), such as lucrative extra-curricular activities in New York, Washington or way stations, such as getting quietly potted at Mory's. In short, the a. p.'s attitude toward students—*ab initio, per se, e pluribus unum,* and *lux et veritas*—is one of resentment at the intrusions on his pleasure and leisure that are caused by his having to be, part-time, a teacher. If only he could retain the rank and pass up the pedagogy.

Not so many years ago, at a university down near the Mason-Dixon Line, there was an abortive attempt to set up a law school with all faculty and no students. The bright idea seemed to be that the profs would then have ample time to think great thoughts, talk great talk, and write great rubbish in the regular legalistic-illiterate tradition. At any rate, the rush of law professors for jobs at the joint made it abundantly clear that, though a professor's bread may be buttered on the student side, he still daydreams of jam on his crumpets, an egg in his beer, and seven class-less days a week on his teaching schedule.

Granted there are exceptions. There are professors who build both their egos and their reputations on a shifting stable of coddled disciples who return the favors of high marks and juicy

[1] Not to be confused with a female gander.[2]

[2] This wouldn't be legal without a footnote. A footnote on a footnote makes it doubly legal.

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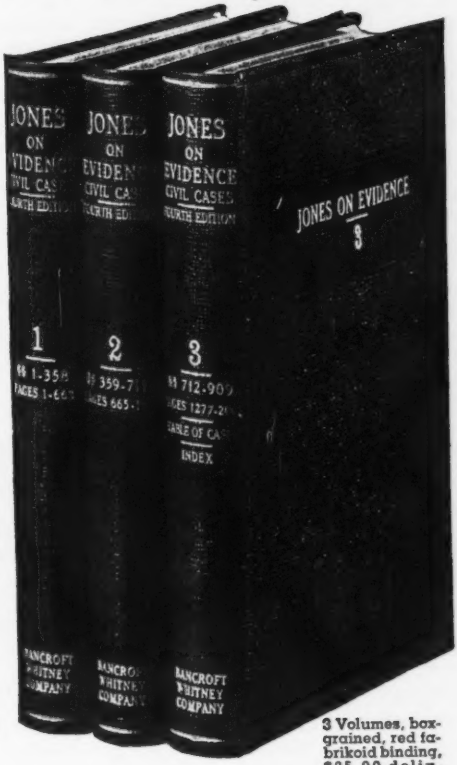

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jobs by touting Dear Teacher all over the legal lot. Yet this type of prof rarely rates very high in the esteem of his more conventionally consecrated colleagues. True, he may end up on the Supreme Court (any resemblance to actual persons, living or dead, is purely coincidental), but he is far more likely to end up in academic anonymity and oblivion.

Recollection comes, at this late date, that it was the students, not the profs, who were to be gandered at. Suppose we dispense with the girl students first—as Dean Hadley, in her infinite wisdom, has long hankered to do. The classic comment on the legal ladies was made by one Thurman Arnold during the reign of King Charles the Clark. Arnold opened a faculty meeting—and very nearly closed it—with this plaintive plea: "Mr. Dean, it's Spring and the grass is green and I go into class and look down and there sits little Miss So-and-so right in the front row with a tight sweater and her hands behind her head and her elbows back and, Mr. Dean, how in hell am I supposed to keep my mind on Trials and Appeals?" So much for the gals, from a prof's eye-view.

As for the males, they fall—when pushed—into a quartet of categories. There are, first, the Eager Beavers. They are so prepared they would make a Boy Scout tear off his merit badges in shame. They are prepared, not only on the assigned cases, but on the footnote cases, the cases that didn't make the footnotes, the articles, the comments, the treatises, the World Almanac, and the Encyclopedia Britannica. Their hands are forever waving. When you call on them, as you occasionally have to just to give their arms and your eyes a rest, what they invariably want to prove is that they have read something you haven't. They invariably have, and they occasionally prove it—thus making you look foolish. As though that would be likely to better their marks—the dopes.

Then there are the Sleepers—in the sporting as opposed to the somnolent sense. These are the birds you never hear of, or from, until they turn up with good exams and you start wondering just who they are and whether they crawl out from under the radiators, their pockets bulging with class-notes, at the end of each term. Sometimes a potential Sleeper, silent in class, frequents your office to try to impress you with his interest, his industry, and especially his winning personality. He wants you to get to know him. You get to know him, all right.

The third group is the Free Riders. Like the Sleepers they never are heard from in class. This is because they are never in class. But a couple of days before the exam they buy a canned set of last year's notes or bum a fresh set of this year's notes and get to work with the coffee

and the benzedrine. Once in a while they are clever enough, their minds being more uncluttered, to get better marks than the guy whose notes they borrowed. More often, they turn up at your office, after the marks come out, and wonder at length how they could ever have done so poorly when they worked so hard.

Finally, there are the Eager Riders, a cross between Group I and Group III, and the lowest breed of student. Eager Riders are always in class and they are never prepared. In a none too subtle effort to anticipate and avoid being called on, they wave their hands wildly and come up with a screwy spur-of-the-moment question. The more irrelevant the questions, the more pained and persistent the questioners—and time lurches on. Eager Riders are no more unpopular with the professors than with their fellow students who yearn to exterminate the pests. That pleasure, however, is exclusively reserved for the professors.

Still and all and by and large, students are an O.K. collection of characters, especially when they invite you to their parties and buy you drinks and encourage you to dance with their girls—under the impression they will thus get higher marks. The impression, incidentally, is entirely accurate. Well, fellows?

Judgment Protection

The appellate court will not allow a judgment to be ambushed. Swindle v. Poore, 59 Ga 336, per Bleckley, J.

Religious Distraction

The will of the testator was upheld notwithstanding the unfortunate distractions of church services.

The testator was a native of Kentucky, but had lived 40 years or more in Platte county. His relations lived in Kentucky. Until the last year or two of his life, he was a man of vigorous body and good mind. He attended to his own business. Was fond of going to church and of reading the Bible. Paid close attention to the sermon, and was fond of discussing it and repeating it. Showed no inclination for female society, but when he got past 80 years of age he changed in that respect. He showed a desire for society of young women, particularly girls of 18 or thereabouts. When he would go to church, instead of taking his former usual, seat, he would take a position where he could look at the girls, and, when afterwards questioned about the sermon, he would confess he remembered little of it.

Hamon v. Hamon, 180 Mo 685, 79 SW 422

One Air Law—Or 49?

By MERRILL ARMOUR
Assistant General Counsel, Safety, Civil Aeronautics Board

Condensed from "Flying," March, 1947

THE slow but continual growth of Federal, state, county and city aviation regulations is becoming a critical problem to all who fly. State rules encompassing a field as broad as air traffic, competency of airmen, airworthiness, operation rules and taxes are growing with increasing speed.

The Virginia General Assembly last spring, for example, actually considered adopting a law to tax all flights over any portion of the state. This measure passed the lower house, and though it failed to be reported out of the upper house committee it indicates how far many persons would be willing to go in restricting aviation.

Behind this proposal apparently was the idea that since state-based planes paid gas tax in Virginia, those which did not purchase gasoline in Virginia should somehow be made to pay proportionately for using the air space above the state. But who (besides the majority of members of the Virginia lower legislative chamber) believes that air-space is a usable commodity for which each individual must pay? And if you do so believe, how are you going to enforce such a law?

In Connecticut all airmen must have a state license and pass a qualifying examination given by the state to get the license. Each private pilot must pay a fee to be examined annually by a state flight surgeon. A non-resident may not operate for hire within the state and a non-resident pilot must report to the Commissioner of Aeronautics if the pilot remains in the state longer than necessary to refuel or make minor repairs. All aircraft must be registered annually after an inspection, and there must be payment of a fee.

If you were relying upon the Federal air traffic rules to guide you in Connecticut until the law was recently amended, you would fly into trouble. You must maintain an altitude of 2,000 feet over a crowded area. Whether the "crowded area" is to be

interpreted like the term "congested area" in the Federal regulations you will have to study the Connecticut cases to know. You cannot fly under 500 feet no matter how safe it may be and you violated the law if you performed any acrobatics under 1,500 feet or any acrobatics with passengers. If you were a student pilot you must wear a parachute—except when taking off or landing!

Should you be flying over New York State you would have to take care not to fly directly over another aircraft regardless of the distance between you and the other aircraft. All your takeoffs and landings in the state must be upwind and on a clear field if possible, regardless of the amount of wind. If you are carrying passengers you cannot deviate from the altitude rules of the state because of the stress of weather.

If you are the owner of an aircraft and have loaned it to some friend in Vermont you are liable for damages in case of accident. Several states in 1945 authorized state agencies to pass rules and regulations governing all phases of aviation.

The problem, therefore, is not imaginary and prospective but is actual and immediate.

A comprehensive survey of state laws would show that aviation is comparatively free—so far—from conflicting state restrictions. But to visualize how this situation can develop look at the motor trucking business for which the states adopted rules and regulations long before the Federal Government gave consideration to the problem.

Consider the various state laws concerning lighting equipment for trucks, varying through a range of white, yellow, amber, green, purple and blue. Colors legal in one state break the law of other states.

Nine states require six "identification" lights—three on the front and three on the rear of the vehicle. The rear identification lights must be all red; but those on the front variously are required to be white, yellow, amber or green. Front lights which are green in Illinois violate the law in Iowa, where they can be either white, yellow or amber.

Aviation has had a long head start in the transportation field because some far-sighted men in Congress undertook Federal legislation long before the states attempted any.

Under present Federal law the authority to pass safety rules and regulations for aviation is

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vested in one organization. The pattern set by that organization in its 1945 revision of air traffic rules, pilot standards for private pilots and operating standards for private and commercial pilots and operators, illustrates what can be done when aviation has but one organization to deal with. The revised rules are simple and comparatively free from burden. Further, whatever individual opinions may be concerning the wisdom of any particular rule or regulation, there is this positive advantage:

There is but one set of rules, regulations and standards which the pilot must meet; one set of safety requirements with which the commercial operator must comply. There is but one set of airworthiness requirements for the manufacturers. Everyone wants uniformity. Everyone wants to have one pilot license which is good everywhere; one aircraft license, one set of standards, inspection and operation rules to follow. No one has suggested that there would be any advantage in having 48 sets of rules or standards.

Notwithstanding this unanimity of opinion, state officials and Federal officials spend hours and days that add up to weeks and months of discussion, arguments, drafting and endeavoring to put legislation on the books of the 48 states to duplicate and interfere with Federal legislation and which serve merely to add burdens to the pilot, the aircraft owner and the operator. So far the only reason given that seems to justify this effort has been that unless the states can enforce safety rules and regulations, aviation will be retarded by the failure to curb careless, reckless and hazardous flying.

There is some merit in this argument. It cannot be expected that with the expansion of flying which has taken place during the past 12 months the Federal Government, which has had its civil agencies geared for limited wartime activities, could have provided the complete coverage necessary for an adequate job of enforcing the regulations. Furthermore, there is no indication that Congress intends to appropriate sufficient funds to do the job and no one has suggested how the Federal Government can meet the needs for enforcement under the expanded activity without adequate funds.

The questions then are: Can uniformity be maintained; Can the many additional and greatly varied burdens which lie in the duplication of Federal regulations by the states be prevented and the states still have an opportunity to participate in enforcement when they find it necessary? There is every reason to believe so. The history of state and Federal enforcement makes it difficult to understand why there is an endeavor to complicate the situation by passing

48 sets of safety rules and statutes.

The solution suggested is state enforcement of Federal rules and regulations. Legally, there is no objection to this procedure. The Supreme Court of the United States, as early as 1876, gave a thorough review of the problem and pointed out that the states and Federal Government were not foreign to each other. The recognition of this authority is found in the first legislation passed by Congress in 1789.

The solution has been given some consideration by the Civil Aeronautics Board. By the use of state enforcement procedure, aviation would need only one book, one certificate. Rules and regulations would be uniform everywhere. The pilot from Maine would not wonder what particular rules or requirements he would find in Louisiana.

Obviously, such a system would require co-operation between the states and the Federal Government. We are finding in every phase of our national life that this co-operation is essential. Its effectiveness is amply illustrated in other fields of which the Department of Agriculture, and particularly the Agricultural Extension Service, is only one example.

Aviation knows no boundaries. Pilots and pilot organizations must give this problem consideration and discussion. While aviation achieves uniformity of rules and standards abroad and makes international flights free from burdensome restrictions, can we do any less than this here at home?

The Lawyer's Version of the 23rd Psalm

The Lord is my Judge; I shall not fail.
He guideth me to a safe shore;
He charteth my course.
He keepeth my record straight.
He ruleth my conduct to the Court and to litigants.
Yea, though I live midst strife and dissension,
I counsel peace and forbearance.
For Thou art ever in my thoughts.
Thy law and Thy commandments are with me always.
Thou givest me courage in adversity and consolation in defeat.
Thou art my court of first resort, my tribunal of last appeal.
Surely the approval of my brethern shall be my reward during my life,
And I shall live in the memory of my friends forever.

Contributor: Louis Lande, Washington, D. C.

What Price Justice

By
Albert Edward Sherlock
of the Denver Bar

★

Condensed from Dicta, February, 1947

THE justice of the peace in America arrived with the Mayflower and has not been improved since that day. Our modes of transportation, both on highways and in the air, have progressed while the office of the justice of the peace remains as staid as on the day of its creation.

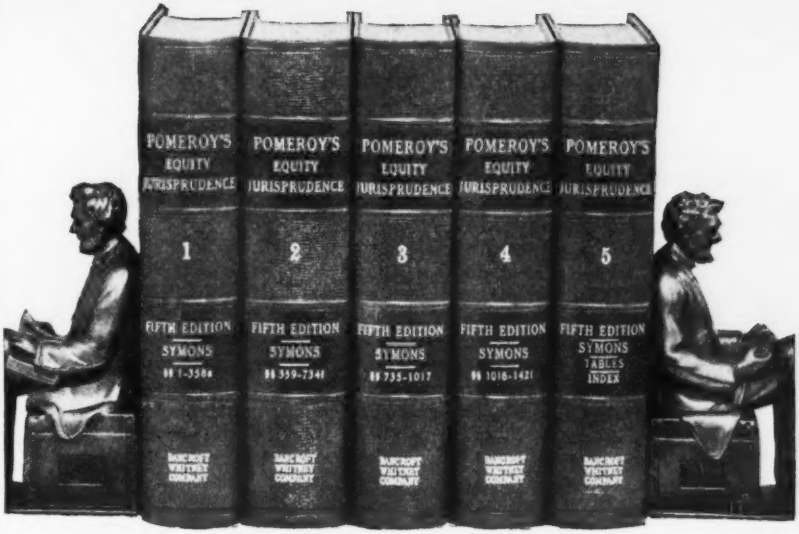
The institution of justice of the peace may be said to date from the year 1360, when the statute 34 Edw. III, c. 1, appointed "one lord, and with him three or four of the most worthy in the county, with some learned in the law" to keep the peace and try felonies and trespasses at the king's suit. But this authority obtained only when two or more of these officials acted together. From then on they became known as justices and very soon thereafter reference was made to them as "justices of the peace," in the statute 36 Edw. III, c. 12 (1362).

Under date of January 6, 1946, there were 260 justices of the peace in Colorado. Under date of September 28, 1946, 258 questionnaires were mailed to the list as supplied to the writer by the Secretary of State, and returns from 131 of said justices of the peace who answered the questionnaire above referred to reveal some very interesting facts and support my argument for a reform or abolition of the present system. There were: 12 Farmers; 10 Federal or local government employees; 3 Housewives; 11 Laborers; 13 Merchants; 5 Office workers; 7 Professional; 12 Real estate and insurance; 22 Trades; 7 Retired; 9 Returned unclaimed—address unknown; 8 Deceased; 6 Resigned; 6 Not qualified; 127 No reply. Total 258.

The answers to the writer were courteous, in most instances prompt, and in many cases very humorous, and advocated a reform from their viewpoint. From Mr. —— I quote:

"One 'true fact' as it is now is that justice fees are the same as they were when common labor was $1.00 per day. The boy who mows my lawn gets more than I do for messing with other people's troubles.

"I will quote from a letter that



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I wrote to a member of the committee that was asking me for a statement of my income from justice fees: 'If your committee will see to it that justices get more Greek weddings, with sizable fees and twelve hours of refreshments both liquid and solid, and less request for the collection of whiskered accounts by way of the small claims court, you will have done us a good turn.'"

From Mr. ——, ex-justice of the peace, I quote:

"I was nominated in 1942 much against my desire and only on the last day filed an acceptance, then qualified against my better judgment. Ditto 1944, and got all I could stand and resigned June 1st, 1945, and if the good Lord keeps me in my normal senses, never again will I be caught in such a position."

From Mr. ——, I quote:

"I am heartily in favor of establishing some method or methods by which a justice of the peace might have to qualify himself as to his ability to sit on this bench and in this, I fully realize that I, myself would probably be disqualified. Even so, I do not believe that the bar association should be permitted by the legislature to make as one of these qualifications, membership within that group. I do not believe, either that these members should be restricted from sitting as justices of the peace, with the limitations as now set forth in the state statutes. I do believe that there are many people living in this state who are intellectually qualified to sit on these benches who have never attended law school or perhaps a university. I believe that an education is obtainable on our streets and in our books, papers and magazines that come to us after our school days are over. I believe that there are graduates from other walks of life who would make admirable justices. I do not believe that the state would be unreasonable in requiring that a justice be compelled to pass a fair intelligence test, designed not to see how much law the person already knew but to see how much law the individual might be able to absorb, with the job to be held as the sole objective.

"Insofar as I am personally concerned, it makes little difference. I do not seek to earn a livelihood by this means and I very frequently find these duties seriously interfering with those in which I am more vitally interested. No doubt, before any legislation whatsoever becomes law in this matter, I will have turned my docket over to someone else. I realize, however, in this matter, there is danger in going too far in attempting to improve a condition that is not nearly so serious as some of our state laws which are going unheeded."

The office of the justice of the peace has been criticized throughout the press for many years mainly on the system of

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fee collection basis which dates back to colonial days. "The justices, being subject to no supervision, and depending so much on their fees that J. P. came to mean 'Judgment for the Plaintiff', formed unholy alliances with collection agencies, installment houses, and the like, and very generally became actually corrupt. The idea is that every such district will have men of substantial worth who will willingly accept a place in a responsible judicial system. Their local standing and practical judgment, assisted by expert direction, will permit just that flexible, informal, and decentralized procedure which has always been aimed at in this country, and which seems to exemplify the American instinct for local government. The type would be that of the local Solomon, whereas the J. P. too often suggests Dogberry."

There is a move on in various parts of the country, particularly in the Rocky Mountain region for a uniform system relative to the administration of justice in the inferior courts, more particularly the justice court, and the time is now ripe for that procedure. Chief Justice Charles Evans Hughes of the United States Supreme Court has said:

"That upon the minor courts rests the burden of all our legal institutions. Approximately seven million persons are haled annually as defendants into these lower courts of the United States. The most cautious and law-abiding citizen is likely at any time to be summoned before a magistrate or police judge to explain some petty infraction of our complex laws."

And again from a very learned article by Mitchell Dawson I quote:

"The state sets the squire up in the business of dispensing justice by the piece. He parcels it out at fixed prices, quaintly known as costs, which go into the pockets of the justice and the constable. In most states it is

the only way these worthies have of getting paid."

And a further quotation by A. J. Walling, an English author:

"Lord Coke said: 'The whole Christian world hath not the like office as justice of the peace, if duly executed.'"

"The stress, it will be noted, lies on the office and not upon the person of the justice, which has not escaped criticism either anciently or recently. If there is less humor there is even more pungency in the ironies the modern journalist applies to the Great Unpaid than in Shakespeare's portrait of Mr. Justice Shallow."

Now that we have introduced Mr. Justice Shallow on the scene, I quote from Bendheim Bros. and Co. v. Baldwin, 1884, 73 Ga. 594:

"This case was tried in a justice's court on appeal before a jury, the Honorable R. G. Riggins, justice of the peace, presiding. His Honor charged the jury as follows: 'Gentlemen, this is a case which has been tried by me before, and I decided in favor of defendant; I further charge you, gentlemen, that if you find that any settlement has been made, you find for defendant; retire and make up your verdict.'

"The law does not require a justice of the peace to charge the jury at all; his ignorance of the law, as well as propriety, would seem to demand that he should not, but if he undertakes to instruct the jury, he must do it correctly and in accordance with law. A justice of the peace is generally a man of consequence in his neighborhood; he writes the wills, draws the deeds and pulls the teeth of the people; also he performs divers surgical operations on the animals of his neighbors. The justice has played his part on the busy stage of life from the time of Mr. Justice Shallow down to the time of Mr. Justice Riggins. Who has not seen the gaping listening crowd assembled around his honor, the justice, on tiptoe to catch the words of wisdom as they fell from his venerated lips?

"'And still they gazed,
And still the wonder grew,
That one small head
Could carry all he knew!'"

". . . *uh, would you mind taking my card also—in case you ever need a good 'mouthpiece'* . . ." By Albert J. Smith, New York City.

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BY RALPH J. RIVERS
Attorney General of Alaska

THE Nenana Ice Pool is to Alaska what the Irish Sweepstakes is to Europe. For one dollar a ticket Alaskans guess each spring on the day, hour and minute at which the ice in the Tanana River will break up. As the ice moves a string is pulled which stops a clock and the holders of tickets marked with the correct guess win the money. Only persons in the territory may participate and no tickets or counterfoils are shipped in interstate commerce.

As a result of this classic of the North an amusing situation arose in 1932. About the 13th of May a stranger walked into my law office and asked if I were a Mason. I said, "No." Thereupon he said, "All right, then I'll retain you." He explained that his opponent was a Mason, the opponent's lawyer was a Mason, and the local judge was a Mason, and so as far as he was concerned no Mason could represent him. The client's name was Larson.

The case was as follows: One evening a week earlier he and the boys at the big mining company camp near Fairbanks had been discussing their ice pool tickets. A late break-up was expected. Larson who had a ticket marked for the 11th of May discovered that one, Johnson, had a ticket for the 12th. One had said to the other, "Let's pool our chances on these two tickets and split 50–50 if one of them wins." The other said, "O.K." Others present were witnesses.

The Ice moved on the 11th and Larson's ticket was one of four winners. The share forthcoming on his ticket was approximately $16,000.00. After the news was announced, Johnson had rushed up to Larson and shook his hand and said, "We win." Larson had said, "What do you mean, 'we.'" Johnson thereupon reminded Larson of his bargain. Larson had said, "Hell, I was only foolin'. Everybody slings a lot of bull about what he will do if he wins."

Johnson had retained one of the leading lawyers, and the stakeholder, a reliable mercantile company, had said it would hold the money pending agreement of the parties or deposit same in court on an interpleader. My first reaction was that the whole affair was a gambling transaction and that the Court would have none of it. However, on looking into the matter it was

discovered that although territorial law prohibited the maintaining of a lottery, no illegality attached to the purchase or possession of a lottery ticket; that the holders of the ticket had done no wrong, and that the Court would adjudicate the interest of the parties in the contingent fund in question without being concerned with the origin of the fund or the usual obstacle of pari delicto.

However, before a complaint was filed Johnson and his attorney who were good "sourdoughs" offered to take one third of the pot rather than go to court because they did not want to jeopardize that grand old Alaska institution known as the Nenana Ice Pool. A widely publicised controversy might have brought about a "stop order" on future ice pools to the consternation of all Alaskans.

The offer was accepted and the payoff made on the basis of two-thirds to Larson and one-third to Johnson. Larson, thereupon, declared his intention of going back to Norway and living like a gentleman on his $10,000.00. After settling with the Internal Revenue Collector and his attorney, he rented a hall, bought a few cases of moonshine, invited everybody in town to join in the celebration, and left on the next available transportation for the old country.

The fee in the foregoing case was the closest I ever expect to come to winning the Nenana Ice Pool!

No laws, however stringent, can make the idle industrious, the thriftless provident, or the drunken sober.

—*Samuel Smiles*

Poor Timing

On motion for temporary alimony the wife testified that her husband owned real estate of the value of $4,000.00. The defendant's attorney put him on the stand and asked, "What is this property worth?" Without hesitation the defendant replied, "It's worth $10,000.00."

The defendant's attorney, who had expected his client to run true to form and say that the real estate was worth from $1,000 to $1,500, was somewhat disconcerted by his client's evaluation.

"You are not trying to sell it," he admonished him. "You had better talk like you were talking to the assessor."

Virginia H. Mulberry, Official Court Reporter, Fayette Circuit Court, Lexington, Ky.

A Question of Alimony

S. v. S.,28 Ohio Ops 312

ALEXANDER, J.: "This case comes before the court on plaintiff's motion for new trial, the court having awarded plaintiff a divorce but denied her alimony or attorneys' fees. Her right to a divorce is not disputed.

The evidence shows that defendant, William, married his first wife, Effie, in 1905, and has lived with her more or less continuously ever since—and is still married to her. In 1942, apparently concluding that monogamy was monotony, he assumed above alias and married Alma, plaintiff in this action. After two months of duplicitous bliss William gave himself away whereupon Alma forthwith summoned her brother, bundled up William, and with strict injunction against any stoppage *in transitu* shipped William back to Effie, the consignment apparently being on a sort of *quantum meruit* basis on open account rather than C.O.D. Now Alma seeks her recompense, claiming wounded pride, injured dignity, impaired social standing, and ruined reputation. A reporter might call it heartbalm; perforce Alma calls it alimony.

The evidence developed that all during her married life Effie has found William a problem child. Among his strayings off the reservation was one affair of four years' duration. After each episode Effie welcomed him back. At first she felt a slight urge to ask William personal questions about his amours, possibly not without a touch of reproof in her tone. Finding that this technique was definitely not conducive to domestic tranquility she soon learned to curb her curiosity, submerge her urge, receive him 'no questions asked,' and on occasion nurse him back to health and to an approximation of emotional serenity.

Which was cause and which was effect is not clear from the evidence, but at any rate William's moral deterioration was followed in 1937 by mental deterioration of sufficient magnitude to warrant the government in increasing his veteran's pension. And in 1943 shortly after Alma so righteously made restitution of William to his rightful spouse, he was duly adjudged insane and Effie was appointed his guardian. Incidentally, he is now also wholly incapacitated physically, and Effie has been faithfully nursing him more than six months.

The assets accumulated by the joint efforts of William and Effie in their 38 years of life together (and apart) consist solely of the home where they live on the outskirts of Toledo; and William's pension is $100 monthly. It is out of these assets that Alma seeks her 'alimony.'

The trial in no whit resembled a routine contested divorce case. Instead of a plaintiff berating her husband we were treated to the anomalous spectacle of a wife giving her defendant-husband quite a 'build-up'—thereby making more plausible her 'falling for' him, and aggravating her damage. For Alma took the unique position that her plight was not so much attributable to William as to the woman who so inconveniently remained William's lawfully wedded wife, and who moreover, as William's guardian, had the temerity to contest the claim for alimony. Indeed, the trial had many of the aspects of a suit for alienation of affections in reverse English, Alma casting herself in the role of injured alienee, and forcing Effie, whose husband she had carelessly borrowed, to play the part of defendant-alienor.

Alma contended that Effie was guilty of something akin to negligence or at least of contributing to William's delinquency, in that she failed to restrain him from going off on these frolics of his own; failed to follow him; failed to use the telephone to learn his whereabouts; was too lenient with his shortcomings and outgoings, and too ready to take him back after his meanderings and philanderings—'all to plaintiff's damage in the sum, etc.' she might have said. All of which Effie meekly admitted, contenting herself with pointing out that she did not have a car or telephone, did have heart trouble (physiological as well as emotional), diabetes, weighed over 200 pounds, was 66 years old, and somehow did not quite feel up to sleuthing after her elusive, errant spouse.

Cross-examination of Alma developed that she was 55, had divorced two husbands prior to her strange interlude with William; was gainfully employed as a saleswoman both before and after taking William; that she got acquainted with him as a pick-up on a downtown street when he employed the time-honored formula, 'pardon me, aren't you Tessie Lee?'; that he proposed after a couple of weeks, she accepted after a few days, and they married in three months; that he took her riding (in her car) pointing out his home and telling her he had leased it furnished 'until May'; that he told her the woman they saw hanging out clothes in the yard was his tenant (it was Effie); that he brought her baskets loaded with canned fruits and vegetables which he said his good neighbors had put up for him (the good neighbor was Effie—he slipped out home from

time to time and snitched them); that once a month for two months he went out 'home' and picked up his pension check, which, because of some whimsical, governmental idiosyncrasy could not be mailed to him at any place else; that although she had done business in the neighborhood of William's home she made no inquiry about William before marrying him, no effort to check up on any of his fascinating fairy tales.

Altogether Alma's marital exploit appears to be a case of voluntary assumption of risk. She had been wooed and won twice before and both stories had unhappy endings. Now she was being wooed by a street corner pick-up. Clearly it was a case for the application of the doctrine of *caveat futura uxor*. She went into it with her eyes open. That they may have been blinded by love does not excuse her. *Amore stuperi neminen excusat!*

"He lost the case. They gave him custody of the child!"

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As for Effie, the charge that she maintained a sort of attractive nuisance, even if true, provides a perfect paradigm of *damnum absque injuria.* But surely Effie, already injured, is not to be damned. If to err is human, to forgive, divine, William proved his humanity and Effie was at best headed for divinity.

While plaintiff's plea for divorce is meritorious, we must hold her claim for alimony is not; and as the bulk of the legal services rendered by her attorneys had to do with the alimony angle we must hold their claim for fees falls in the same category as her claim for alimony. They espoused a cause which they should have known had little merit, and to require the long-suffering guardian to pay them compensation in the guise of alimony from the incapacitated defendant would be unconscionable. For their justifiable services in obtaining the divorce they can look to their own client who appears to be better able to pay than defendant.

The order *pendente lite* is unaffected hereby. The motion for new trial is overruled. A journal entry may be prepared accordingly.

A Practical Translation

In the appointment as Administratrix c. t. a. of the daughter and sole legatee of a decedent it was explained to her that it would be better not to use any of the estate until after the expiration of seven months from the date of appointment. She wanted to know why she was labeled "c. t. a.," and when I stated that it was an abbreviated term meaning *cum testamento annexo* she said: "So far as I am concerned the initials mean—Can't touch anything;" which was not far from the truth.

Contributor: Elmer H. Lemon, Newburgh, New York

Reason is the life of the law; nay, the common law is nothing else but reason. . . . The law, which is perfection of reason. —*Sir Edward Coke*

Let us consider the reason of the case. For nothing is law that is not reason. —*Sir John Powell*

"If the law supposes that," said Mr. Bumble, "the law is an ass and an idiot." —*Charles Dickens in Oliver Twist*

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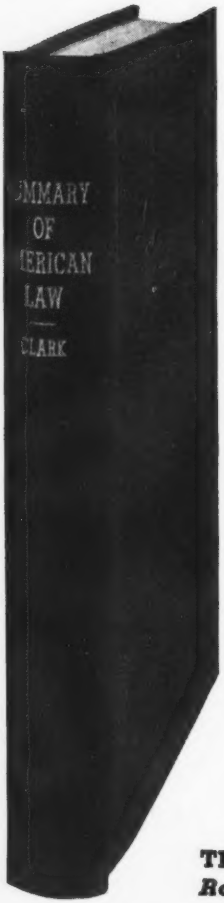

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